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No. 454

In the Supreme Court of the United States

OCTOBER TERM 1968

CHARLES WILLIAM EATON and SAMMY LEE EATON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Charles William Eaton and Sammy Lee Eaton, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit.

Judgment and Opinion of the Court Below

On July 12, 1968, the Court of Appeals for the Fifth Circuit affirmed in a *per curiam* opinion the judgment of conviction entered by the United States District Court for the Northern District of Mississippi after a jury trial. The first count of the indictment against the appellants charged a conspiracy to possess distilled spirits in unstamped con-

tainers and to conceal and remove "commodities" to evade taxes, in violation of Sections 5604(a)1) and 7206(4) of Title 26, United States Code, and in violation of Title 18, Section 371. The second and third counts charged the possession and transportation of untaxed spirits. Both petitioners were found guilty on Counts One and Two; Sammy Lee Eaton, alone, was found guilty on Count Three.

The opinion of the Court of Appeals is not yet reported; it is printed herewith as Appendix "A".

A timely Petition for Rehearing was denied on July 31, 1968.

Jurisdictional Statement

The jurisdiction of this court is invoked under Title 28, U.S.C. Section 1254(1).

Question Presented for Review

1. Where the evidence of guilt is hotly contested and the United States Attorney wilfully and constantly indulges in the exact misconduct condemned by this court in *Berger* v. *United States,* 295 U.S. 78 (1934), is the Court of Appeals bound by *Berger* or may it rely for its affirmance on a misapplication of the plain error rule?

2. Where the prosecutor uses cross-examination as a method to testify to his personal beliefs and as to facts not in evidence, is defendant denied his constitutional right to face his accuser?

Statutes Involved

Title 18, Section 371 and the pertinent parts of Title 26, Sections 5604(a)(1) and 7206(4) are set out in Appendix B as is Rule 52(b) of the Federal Rules of Criminal Procedure.

Statement of the Case

Evidence for the Government

William Pace, an agent of the Alcohol Tax Division of the Treasury Department testified that he and another agent, Earl Morris, were in the home of "special employee", M. C. McCarver in Lee County, Mississippi on April 23, 1965. At about 1:25 a.m. he heard an automobile horn and observed McCarver enter a car and leave. McCarver returned in another car five minutes later.

Pace observed McCarver and defendant Sammy Lee Eaton open the trunk of the car and take out cartons which they put in the shed behind the house. He saw McCarver give Sammy Eaton $300. After Eaton left Pace looked in the shed and saw 50 gallons of whiskey in jugs which did not have federal tax stamps attached to them (R. 42-48).

At 4:00 a.m. on the morning of May 1, 1965, Agent Pace was again in the McCarver house, this time with agent Charles Speer. He saw Sammy Lee Eaton drive up to the house and knock on McCarver's door. McCarver left the house and both McCarver and Eaton unloaded 49 gallons of whisky in plastic jugs, which did not contain federal tax stamps. McCarver gave Eaton $294 (R. 46-48).

Pace's testimony as to the events of April 23 was corroborated by the testimony of agent Morris (R. 70-74). Agent Speer corroborated the testimony with respect to the events of May 1 (R. 76-80).

M. C. McCarver testified he was hired as a "special employee" by the Alcohol Tax unit around April 1, 1965. On April 22, 1965, he drove his car with Leroy Pettygo, to about a mile north of Booneville on Highway 45. His purpose in going to see the Eatons was ". . . about buying 50 gallons of corn whiskey." (R. 54). He had a conversation

with Charles and Sammy Eaton. "I told him who I was and told him what I was there for, and he asked me if I knowed Marvin Turner. I told him, 'Yeah.'" (R. 55). "He" made a phone call and then said "he" got $6 a gallon (R. 55). That was the entire conversation at that time (R. 55).

On April 23, 1965, Mr. Eaton drove up to his house and blew his horn. The witness came out and Mr. Eaton told him he had the whiskey setting up on the road in another car and asked him if he would show the boy where to come to. He got in Mr. Eaton's car and drove about a mile west. Then, the witness transferred to an old Chrysler driven by Sammy Eaton and drove back to his house and unloaded the whiskey in a smoke house (R. 55-56). After the jugs were delivered, agent Pace took a picture of them and then poured some out.

When he first met the Eatons, they were on a tractor. Pettygo introduced him to Charles, saying, "This is M. C. McCarver, he's wanting to talk to you about some whiskey" (R. 58). Charles asked how much he wanted and he said he wanted 50 gallons and the price was right. They arranged for a delivery that night (R. 58).

On April 30, he did not see Charles Eaton (R. 59). He was told Sammy Eaton was in the field; he went there and asked for 50 more gallons of whiskey. Sammy said he would be there that night. Sammy gave the witness Charles' phone number, 4812 in Booneville. He once called that telephone number and spoke to Charles Eaton (R. 60). After Sammy Eaton delivered the whiskey and left, agents Pace and Speer took a picture of the cartons (R. 60).

The witness had never seen Charles Eaton before April 22, 1965. When he saw Sammy Eaton on April 30, Sammy was putting out fertilizer in the field with his father (R. 63).

Evidence for the Defendants

James Pettygo, who lived in Lee County, testified he knew McCarver for about a year. He did not go with McCarver on April 22, 1965 to the home of Charles Eaton. Neither did he introduce Charles Eaton to McCarver (R. 96-97).

On cross examination by the prosecutor, Pettygo stated he had been up to Prentiss County with McCarver, but did not know on what date.

"Q. Isn't it true that the purpose of that trip of McCarver's going up there was to buy or was to attempt to buy, to try to buy, — for Mr. McCarver to try to buy — moonshine whiskey from Charles Eaton?

Now, you know that's right, don't you, Mr. Pettygo?

Let me make it straight. I'm not asking you whether you actually saw any whisky.

You didn't see any whisky up there, did you?

A. No, sir.

Q. And you weren't present when any whisky was bought, were you, —

A. No, sir.

Q. —or delivered, were you?

But isn't it a fact that the purpose of that trip, McCarver's purpose in going up there, was to try to buy moonshine whisky off of Charles Eaton?

Isn't that true?

A. I — I don't know, because I didn't hear them talk.

Q. Let me put it this way: Isn't it true that you knew that M. C. McCarver was going to make this trip to Prentiss County to try to buy moonshine whisky, make some moonshine whisky business?

A. No, sir; not — not for sure, I didn't.

Q. Well, you say not for sure. What do you mean by that?

A. Well, I don't know whether he was going to buy corn whisky or not.

Q. Mr. Pettygo, didn't I just have a conference with you just a few minutes before Court convened?

A. Yes, sir.

Q. Now, didn't you tell me at that time that you knew that M. C. McCarver's purpose in going to Prentiss County was to try to buy moonshine whisky from Charles Eaton?

Didn't you tell me that?

A. No, sir; not directly; not that.

Q. Well, what did you tell me?

A. I said he talked to more people up there than just one.

Q. That's right.

Who did he talk to?

A. He went over and talked to Paul Raines that run a bootlegging joint up there.

Q. And Junior Brinkley, I believe, didn't you tell me?

A. I don't know whether he talked to him or not, because I didn't get out of the car with him.

Q. Who else did he talk to?

Did you introduce him to these people?

A. To which people?

Q. To Brinkley or to the other man.

A. No, sir.

He knew Paul Raines.

Q. He knew them?

A. Yes, sir.

Q. But he didn't know Charles Eaton, did he?

A. I — as far as I know, he didn't.

Q. And that's the reason you went along, wasn't it?

A. No, sir.

Q. Isn't it a fact that when you left you knew — didn't you tell me that you knew when you left, when you were leaving on this trip, — that this man was to go up and try to buy some moonshine whisky?

A. He'd been buying it from people.

Q. And you knew that, didn't you?

A. He was selling it.

Q. And you knew that, didn't you?

A. Yes, sir.

Q. Moonshine whisky?

A. I knew he was selling it.

Q. You knew the purpose for which he went up there, didn't you?

A. Well, not altogether for that.

Q. Didn't you just tell me up in my office that you knew that?

A. I said that he went up there to buy some; yeah.

Q. To buy some moonshine whisky, didn't you?

What do you mean — buy some?

Buy some moonshine whisky?

A. He had bonded whiskey and all. That's what he talked about. He said he wanted some of all of it.

Q. Some of all of it—bonded and moonshine, too; is that right?

A. Yes, sir.

Q. Well, that's what I'm trying to get you to tell the jury.

You knew that among his purposes on this trip was to buy among other things some moonshine whisky from Charles Eaton, didn't you, to try to do it?

A. Now, I don't know whether he tried to buy it or not. I didn't hear them talking.

Q. I'm not asking you if you heard them talking.

You knew the purpose for which he went up there to Charles Eaton's place, though, didn't you?

A. I don't know whether it was Charles Eaton's place or not.

Q. Well, to see, to try to find, Charles Eaton.

You knew why you were trying to find Charles Eaton, didn't you?

A. Yes, sir.

Q. And Mr. McCarver was trying to find Charles Eaton in order to try to get, to try to buy, some moonshine whisky off of him?

You knew that, didn't you?

A. I—

Q. Would you answer "yes" or "no"?

A. To my own—whether I know it or not?

Q. To whether you knew the purpose of the trip of going to Charles Eaton, the purpose, Mr. McCarver's purpose, in going there.

A. Yeah. He was going to buy whisky.

Q. He was going to try to buy some from Charles Eaton, wasn't he?

A. He was going to try.

Q. All right.

Now, I believe you have some felony convictions, don't you, Mr. Pettygo?

A. Yes, sir.

Q. I believe you have a felony conviction for moonshine whisky, don't you?

A. Yes, sir.

Q. And I believe your conviction has been since you went up there, though, hasn't it?

A. Yes, sir.

Q. And you have some other convictions, too, don't you?

A. Yes, sir.

Q. Felony convictions, that is?

A. Yes, sir.

Q. Dealing with grand larceny—

A. Yes, sir.

Q. —and that sort of thing?

How many convictions of that do you have? Four or five?

A. Yes, sir; somewhere along there.

Q. That would be safe to say?

A. I don't know—I don't know exactly how many.

* * * * *

Q. Now, Mr. Pettygo, isn't this what happened: That Mr. McCarver wanted you to go along because he didn't know Charles Eaton, did he?

At least that's what he told you, didn't he?

A. No, sir.

Q. Well, that's the purpose you went along?

A. No, sir; it isn't.

* * * * *

By Mr. Ray (the prosecutor):

Q. That's the purpose for which Mr. McCarver carried you, wasn't it?

I'm not speaking of your purpose in it, but the purpose of Mr. McCarver carrying you was because he knew that you would be recognized by Mr. Eaton?

A. No, sir, because Mr. Eaton didn't know me.

Q. What do you mean by not knowing you?

Do you know me?

A. I know your face. That's all.

Q. Do you know Mr. Eaton's face?

A. Not all that well." (R. 98-102).

When the witness and McCarver arrived at some "joint", he inquired for Charles and a person got Charles who was on the edge of a field. They called him. He did not know what took place because he went back to the car (R. 106). He did not know what the conversation was between Charles Eaton and McCarver because he was sitting in the car with a woman.

"Q. And what was your purpose in being in the car?

A. You—

Q. What did you tell me upstairs your purpose was in being in the car?

A. You told me you wasn't going to bring that out, too.

Q. I told you that I hoped not to bring it out, but you have taken the stand and you are under oath now to tell the truth to this jury.

A. Well, I was in the car to go with—to try to go with the woman.

Q. And that's what you were trying to do when you went back to the car?

A. Yes, sir." (R. 107-108).

The witness or members of his family had some serious differences with McCarver in the past (R. 109).

On redirect examination, the witness said he did not go with McCarver on April 22 to the home of Charles Eaton (R. 111).

Defendant Charles Eaton testified he was a married man, with a family, lived all of his life in Prentiss County and lived at his present home about 8 years. On April 22, 1965, while he was in the field plowing with his tractor, someone at his brother's house hollered for him to come up. He walked up the bluff; McCarver told him his name, where he lived and said he needed 50 gallons of corn whiskey. The defendant told McCarver, "Fellow, you got the wrong place. I haven't been in no whiskey business in the last 13 years; been selling no whiskey . . . I used to be in it." (R. 114).

McCarver then asked him where he could find Kenneth Robinson and Sammy Lee Eaton; he told McCarver they ran a service station in town. McCarver left and never came back again (R. 114). The next time he saw McCarver was in court.

He never agreed with Sammy Lee Eaton to transport and deliver untaxed corn liquor to McCarver either on April 22 or 23, 1965 nor did he go to the residence of McCarver on April 23 near Saltillo, Mississippi. Neither did he pick up McCarver and drive him to meet Sammy Lee Eaton (R. 115-116).

He had not been connected in any way, directly or indirectly with the possession, transportation or delivery of corn liquor within the last 12 or 13 years (R. 160). In 1953 he was convicted of violating the Internal Revenue laws by his plea of guilty in a federal court in Oxford (R. 117-118).

On cross examination, the following occurred:

"Q. Isn't it a fact that during 1965 you got afraid of being involved in this whiskey business and that this man named McCarver came to your house and blew the whistle, that he was intoxicated and blew the whistle and walked in and — do you know Joe Carnathan?"

The defendant knew Carnathan and his wife.

"And weren't Joe Carnathan and his wife present in your house when he came in, and since he has been dealing with the both of you he was caught in the trap, and you couldn't make any more, and that time you told him you had been out of the whiskey business 13 years, didn't you?" (R. 124).

An objection to the question was sustained (R. 125).

"Q. Isn't it a fact that Mr. and Mrs. Carnathan visit back and forth with you?

A. Yes, sir. They've been to my house.

Q. You all have had business together, haven't you?

A. No, sir.

Q. What kind of business are you in or were you in at that time in addition to being a farmer?

A. Well, I trade a few old cars, and traded some house trailers last year, —

Q. And you —

A. — sold some.

Q. And you mess with bonded whisky, too, don't you?

A. Yes, sir.

Q. And you were at that time, weren't you?

A. Yes, sir.

Q. And Joe Carnathan and you were involved together in some of that, weren't you?

A. No, sir.

Q. Well, you know that Joe Carnathan was also in the bonded whisky business at that time, don't you?

A. I didn't. I didn't know.

Q. Isn't it a fact that on one occasion, after April and after this case, after McCarver had been up — isn't it a fact that on one occasion he came to your house when the Carnathans were there visiting you? Isn't that a fact?

A. No, sir.

Q. You deny that?

A. Yes, sir.

Q. Do you know Carl "Towhead" White??

A. I've heard of him.

Q. Mr. Eaton, isn't it a fact you have been in business with him, —

Mr. Windham: If the Court please, —

Mr. Ray: Q. — in the moonshine —

Mr. Windham: — we object to that. It can throw no light on this case.

The Court: The objection is overruled.

Mr. Ray: Q. Do you know what reputation he has with respect to violation of the Internal Revenue laws with respect to nontax-paid whisky, what record or reputation he has?

A. I read in the paper last year about him getting caught at a whisky still.

Q. About having a conviction dealing with whisky?

A. Yeah. I read it in the paper.

Q. Is it your testimony that you don't know him very well?

A. No, sir; I don't know him.

Q. You don't know him at all?

A. I doubt if I'd know him if I'd see him.

Q. You had no business dealings with him?

A. Never. Not no kind of business dealings with him.

Q. I believe at this time, in April of '65, you said you were in the bonded business. You did have a tax stamp, didn't you?

A. Yes, sir.

Q. But you're just telling the jury you weren't dealing with moonshine whisky; is that correct?

A. No, sir; I ain't fooled with none. It's been about 13 years.

* * * * *

Mr. Ray: Q. Mr. Eaton, you acknowledged to the jury that you had and have some knowledge of the moonshine business in the past?

A. Yeah: back — I was in — sold whisky back before I went to the penitentiary, and I — when I went to the penitentiary — I haven't fooled with none since then.

Q. Isn't it a fact that you have a reputation of being and having been in the business at that time in northeast Mississippi?

A. What time?

Q. Back in April of 1965.

A. No, sir. I ain't had no reputation of moonshine whisky since I went to the penitentiary.

Q. Isn't it a fact that you were actually using — what relationship are you to this other defendant here?

A. He's my nephew.

Q. Isn't it a fact that you were using him and trying to stay behind the scenes and not get caught in actual possession of the whisky in this case?

Isn't that a fact?

A. No, sir.

Q. Did you know he was in the business?

A. No, sir; I didn't.

Q. And that's just as true as everything else you have said, isn't it, that you didn't know he was in the business?

A. I didn't know until he got caught, I mean. I didn't know nothing about it until he got — until we got the indictment.

Q. Well, didn't you testify that you told Mr. McCarver — Didn't he ask you some of these folks that might be in the moonshine business?

A. He didn't — he asked me where he could get hold of Sammy and Kenneth Robinson at.

Q. And you knew he was up there trying to buy moonshine whisky, didn't you?

A. He was trying to buy it from me. I didn't have none. I told him I was out of the business.

Q. So, you are telling the jury that you did know that Mr. McCarver was trying to find him because at least he thought he might be in the business?

A. Well, he tried to — he found me, but he —

Q. And he thought you must be in the business?

A. He —

Q. That's the reason he asked the question, wasn't it?

A. He said somebody told him I was in the business.

Q. And where did Mr. Pettygo stay during all of these conversations?

A. Well, I — I don't know. I didn't never see Mr. Pettygo myself.

Q. You never did see Mr. Pettygo?

A. No.

Q. You don't even know whether he was there or not?

A. I don't know.

Q. Was anyone else in the car?

A. Well, there was somebody in the car, but I don't know who it was.

Q. How far were you from the car?

A. Oh, I guess as far as from here to the end of the building down at the edge of the field.

Q. Just about the same distance he testified about that?

A. Somewhere about that. It was down on the bluff there." (R. 125-129).

The following witnesses appeared for the defendants and testified that the reputation M. C. McCarver had in the community where he lived for truth and veracity was bad: Junior Hood, who ran a general store and knew McCarver all of his life; Virgil Gentry, who worked at

National Springs and knew McCarver all of his life; D. D. Crawley, a farmer, who knew McCarver all of his life; Hardy Turner, a farmer, who knew McCarver 10 or 12 years; Russell Reece, a cattle farmer, who had formerly been Sheriff of Itawamba County and knew McCarver for 15 years (R. 130-139).

The final arguments

Mr. Ray, the United States Attorney, argued to the jury as follows:

> "I submit to you this man tells you that he has a record, a past record, in this thing. I submit to you that, as reasonable men, you can look at him; you can judge him, and while judging him — the Court's told you he has a felony conviction. So, you must receive his testimony — you must receive it — with caution, too, and his felony conviction alone is enough to make you lay aside his complete testimony if you want to. That is the defendant, Charles Eaton. (R. 192).
>
> * * * * *
>
> ". . . and I believe that he [McCarver] did see him [Charles Eaton], and I believe that you gentlemen, judging from the educational level, the background of this informer — I think that as to his testimony here — I think it is most credible." (R. 193).

REASONS RELIED ON FOR GRANTING THE WRIT

1. *The prosecutor's misconduct exceeded that which was condemned in Berger* v. *United States*, 295 U.S. 78 (1934).

That a prosecutor may violate the rules of evidence, the canons of ethics and all concepts of fairness to insure the conviction of a defendant is a concept which has been long and soundly condemned by this court. In reversing the conviction of the defendant in *Berger* v. *United States*, 295 U.S. 78, 84 (1934) this court found that the government prosecutor had done the following:

> "He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner."

Of the closing argument in *Berger*, the court said:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." (p. 85).

The catalogue of improprieties and prejudicial actions of the prosecutor so forcefully condemned in *Berger* was repeated with a vengeance by the prosecutor in the instant case.

Rather than cull out and characterize each similarity between the prosecutor's tactics and language, we have set out appropriate and representative portions of what occurred in the instant case under Evidence for the Defendants in the preceding Statement of the Case. The recital speaks for itself.

In *Berger*, this court recognized a fact known only too well to practicing criminal lawyers — that misconduct of the prosecutor by use of innuendo, insinuation and personal vouching is irrevocably prejudicial to the defendant in the collective mind of the jury.

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (p. 88).

See also: *Stewart* v. *United States*, 366 U.S. 1, 8 (1961) (factually untrue inference drawn from a leading question by the prosecutor); *Viereck* v. *United States*, 318 U.S. 236, 247-248 (1943) (appeal to jury on grounds wholly irrelevant to any facts or issues in case).

Although the Fifth Circuit Court of Appeals chose to affirm the defendant's convictions in a *per curiam* opinion, rendered eight months after the oral argument, it was constrained to comment that:

> "Our examination of the record persuades us that it will never be used as a model for prosecutors to follow in other cases." (Appendix A, p. App. 2).

But the Court of Appeals specifically refused to apply the plain error rule embodied in Rule 52 (b) of the Federal Rules of Criminal Procedure and further stated:

> "There was more than enough admissible evidence to establish the appellants' guilt." (Appendix A, p. App. 3).

This reasoning misconceives the purpose and application of the plain error rule. The errors in this case *do not* relate to the sufficiency or admissibility of evidence. They relate to the official misconduct of the prosecutor and the prejudicial effect of this misconduct on the jury. Therefore, the question becomes — did the government have a strong case which would have remained strong if the prosecutor had not committed the prejudicial errors? As was said in *Berger:*

> "If the case against Berger had been strong, or, as some courts have said, the evidence of guilt 'overwhelming', a different conclusion might be reached." (p. 89)

But in the present case the evidence was not overwhelming, was sharply in conflict, and the prejudicial misconduct of the prosecutor related directly to the testimony of defense witnesses and closing argument.

Five persons testified to the poor reputation for truth and veracity of M. C. McCarver, the government's chief witness. James Pettygo, testifying for the defense, directly refuted McCarver's testimony on several key points. The defendant, Charles Eaton, denied crucial portions of McCarver's testimony in addition to denying the charges in the indictment.

Pettygo and Charles Eaton were the witnesses who were subjected to the prejudicial actions of the prosecutor on cross-examination. It was Charles Eaton whose prior record was wrongfully manipulated by the prosecutor in closing argument. It was M. C. McCarver for whom the prosecutor personally vouched in his closing argument.

The cross-examinations of both Pettygo and Eaton are filled with unproven and malicious innuendos by the prosecutor.

In this context the prejudicial and unprofessional actions of the United States Attorney, so strongly condemned by this court in *Berger,* call for application of the plain error rule.

As Justice Harlan said in his dissent in *Chapman* v. *California,* 386 U.S. 18, 52 Fn. 7 (1967), where he spoke of the situations in which the harmless error rule should not be applied, there is, in this court a

> " . . . recognition that certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. E. g., Berger v. United States, 295 U.S. 78, 79."

In its brief *per curiam* opinion the Court of Appeals comments, "In short, this is another moonshine liquor case." To this, we are constrained to reply most respectfully — in short, no matter what the substantive nature of the case, the defendants are entitled to be tried in a manner consistent with their right to a fair trial, unprejudiced by improper actions of the United States Attorney trying the case.

2. *Defendant's rights to cross-examine and to face his accuser were violated.*

Significant that McCarver was without a word of corroboration as to alleged transactions with defendant Charles Eaton. He was a hired informer (R. 42), an ex-convict (R. 175) and a person of such bad reputation in his community that the people who knew him most of his life in the community where he resided testified to his bad reputation for truth and veracity (R. 130-140).

The prosecutor, recognizing the weakness of his case, it being based upon the uncorroborated and contradicted testimony of an untruthful paid informer, attempted to bolster his case by his own unsworn testimony. (See Evidence for Defendant, *supra* pp. 5-14).

By his improper questions the prosecutor testified to the following:

(1) That McCarver's purpose of going with Pettygo was to purchase illegal alcohol from defendant Charles Eaton.

(2) That McCarver wanted Pettygo to go with him, because Charles Eaton knew Pettygo.

(3) That McCarver had come to defendant's house when Joe Carnathan and his wife were present.

(4) That Charles Eaton has been in business with Joe Carnathan.

(5) That defendant and one White were in the moonshine business together.

(6) That defendant has a reputation in the community for being in the moonshine business.

By so testifying the prosecutor denied defendant his right to cross-examine his accuser, a right secured by the 6th Amendment to the United States Constitution.

In *Douglas* v. *Alabama,* 380 U.S. 415, 13 L.Ed. 934 (1965), the court considered circumstances similar to those found in the instant case. The prosecution called as a court witness, a co-defendant, who had been convicted in a separate trial and had given a confession implicating defendant. This co-defendant was appealing his conviction, and refused to answer, asserting his right against self-incrim-

ination. The prosecutor was permitted to question him concerning defendant's involvement as stated in his confession. The co-defendant refused to answer. Although this court spoke mainly of defendant being denied his right to confront the co-defendant, it recognized that such procedure permitted the prosecutor to be a witness against defendant, this court held that defendant was denied his constitutional right to confront his accusers.

In the instant case, the prosecutor by his long questions, which did not require answers, testified. Defendant could not confront the prosecutor, require the prosecutor to take the stand, and be subject to cross-examination. Defendant was thereby denied his constitutional right of cross-examination. *Pointer* v. *Texas,* 380 U.S. 400, 13 L.ed. 2d 923 (1965); *Douglas* v. *Alabama, supra.*

CONCLUSION

For the foregoing reasons, we pray that the Petition for Certiorari be granted and that this court either remand the cause to the Court of Appeals for the Fifth Circuit for a consideration of the points set out herein, or that this court note the errors and make known its ruling thereon.

Respectfully submitted,

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GERALD M. WERKSMAN
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Attorneys for Petitioners

APPENDIX "A"

In The

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23901

CHARLES WILLIAM EATON and SAMMY LEE EATON,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Northern District of Mississippi

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(July 12, 1968)

Before JONES and GODBOLD, *Circuit Judges,* and SCOTT, *District Judge.*

Per Curiam: The first count of the indictment against the appellants charged a conspiracy to possess distilled spirits in unstamped containers and to conceal and remove

"commodities" to evade taxes. The second and third counts charged the possession and transportation of untaxed spirits. In short, this is another moonshine liquor case. Charles William Eaton was found guilty by a jury verdict on the first two counts of the indictment and acquitted of the charge in the third count. Sammy Lee Eaton was convicted on all counts of the indictment. From the judgment and sentence of the court this appeal has been taken.

This Court is urged to reverse the convictions of the appellants on the ground that the Government prosecutor engaged in improper cross examination of a defense witness and one of the defendants, and on the ground that the prosecutor made improper remarks and argument to the jury. Although the appellants were represented at their trial by three experienced lawyers, none of the questions urged on this appeal by other counsel were raised at the trial by objection or otherwise. The appellants rely upon the plain error rule. Rule 52(b) Fed. Rules Crim. Proc. 18 U.S.C.A. As a prelude to the argument that this rule should be invoked, the appellants assert that they "were convicted by means of a trial which violated all known concepts of a fair trial in a federal court, thus" they say, they "were convicted unfairly without proper regard for due process of law."

Our examination of the record persuades us that it will never be used as a model for prosecutors to follow in other cases. Our examination does not persuade us that the appellants have been denied due process of law or that they have been deprived of any other constitutional right.

The plain error rule was intended to be and should be applied to serve rather than to subvert the ends of justice. The rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice. There was more than enough admissible evidence to establish the appellants' guilt. We cannot say that they were denied a fair trial. Tomley v. United States, 5th Cir. 1957, 250 F.2d 549, cert. den. 356 U.S. 928, 78 S.Ct. 716, 2 L.Ed. 2d 759; Mims v. United States, 5th Cir. 1967, 375 F.2d 135.

The judgment and sentences of the district court should be and are

AFFIRMED.

APPENDIX "B"

Sixth Amendment to the Constitution.

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

Rule 52(b), F. R. Cr. P., Title 18, U.S. Code.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Statutes Involved

TITLE 18, U. S. CODE, SECTION 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 26, U. S. CODE, SECTION 5604 (a)(1)

Any person who shall . . . (1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

TITLE 26, U. S. CODE, SECTION 7206(4)

Any person who . . . removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

CHARLES W. EATON AND SARAH L. EATON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

[illegible] VERNOR, JR.,
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[illegible]
Department of Justice,
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 454

CHARLES W. EATON AND SAMMY L. EATON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1968. A petition for rehearing was denied on July 31, 1968. On August 29, 1968, the petition for a writ of certiorari was filed. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the convictions should have been reversed because of the conduct of government counsel to which no exception was taken at the trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioners were convicted of violating the alcoholic tax laws and conspiring to do so (26 U.S.C. 5604(a)(1); 18 U.S.C. 371).[1] On May 6, 1966, petitioner Charles W. Eaton was sentenced to fifteen months' imprisonment on the conspiracy count, and fined $1,000 on the substantive count. Sammy L. Eaton was sentenced on three counts to concurrent terms of three years' imprisonment.

The evidence showed that United States Treasury agents in Prentiss County, Mississippi hired M. C. McCarver as a "special employee" (R. 42). Pursuant to his employment, McCarver, accompanied by a neighbor, Pettygo, went to the vicinity of Charles Eaton's home. Upon meeting Charles Eaton, McCarver gave him the name of Marvin Turner, "a whiskey man," as reference, and Eaton then agreed to sell McCarver fifty gallons of whiskey at $6 per gallon (R. 53-55). In the early morning hours of

[1] The two substantive counts involved transactions of April 22 and May 1, 1965. Charles Eaton was acquitted of the count involving the May 1 delivery (count 3).

April 23, 1965, Charles Eaton signalled McCarver at the latter's home and then brought him to a vehicle driven by his nephew (R. 47), petitioner Sammy Eaton (R. 56, 66). Shortly thereafter federal agents saw Sammy deliver non-tax-paid whiskey at the McCarver home and receive payment for it (R. 43-44, 72-73).

A week later McCarver went back to the area of Charles Eaton's residence. He spoke with Sammy and arranged for fifty gallons of whiskey to be delivered that night (R. 59). On May 1, 1965, Sammy made delivery. Federal agents again witnessed the transfer of money and noted the lack of tax stamps on the whiskey containers (R. 46-48, 78).

The defense called Pettygo as a witness. He denied introducing McCarver to petitioner Charles Eaton (R. 96). Cross-examination, without objection, elicited the information that Pettygo knew McCarver had been buying moonshine and knew that McCarver was trying to find Charles Eaton in an effort to buy whiskey from him (R. 99-100, 105).

Petitioner Charles Eaton testified that he had met with McCarver only once and that he had refused to sell him fifty gallons of whiskey (R. 114-115). He stated that he had previously been convicted of a federal liquor violation (R. 118) but that he had had nothing to do with untaxed whiskey for many years. He knew nothing of his nephew's dealings with McCarver (R. 116-118). On cross-examination, without objection, he was asked whether it was not a fact that he had a local reputation of being a moonshine dealer. He denied this and stated that he did "mess with

bonded whiskey" for which he had a "stamp" (R. 127). He denied meeting McCarver when a Joe Carnathan was present and denied any moonshine liquor dealings with a man named White (R. 125-127). He also denied using his nephew as a "front" (R. 128).

ARGUMENT

Although no objection was taken at trial, petitioners argue that the cross-examination of Charles Eaton and the reference to him in final argument require reversal. The court of appeals properly held there was no error requiring reversal.

Counsel for petitioners make no effort to dispute the guilt of petitioner Sammy L. Eaton. At trial, counsel said that he had no defense for the nephew (R. 185). Thus the argument essentially relates only to Charles Eaton.

Petitioner's claim of plain error must be evaluated in the context of the trial, in which Pettygo, although reluctant to aid the prosecution, did corroborate McCarver's account of making the trip to find petitioner Charles Eaton in an effort to buy whiskey from him (R. 101, 105). The delivery of fifty gallons of whiskey at McCarver's home by the nephew some few hours later tended to confirm McCarver's version of the meeting.

Since, however, no witness other than the two involved testified to the McCarver-Charles Eaton conversation which culminated in the April 24 sale, the prosecutor properly subjected Eaton to vigorous cross-examination. When petitioner Charles Eaton claimed on direct examination that he had not had dealings

in untaxed whiskey for many years, he opened the door to cross-examination concerning his occupations and associates. See *Alford* v. *United States*, 282 U.S. 687; cf. *United States* v. *Kelly*, 349 F.2d 720, 775 (C.A. 2), certiorari denied, 384 U.S. 947. Even if the one question of petitioner Charles Eaton as to his own reputation was improper, it did not add substantially to the case. Pettygo, a defense witness, had testified that he had gone with McCarver to a "bootleg joint" looking for Charles Eaton (R. 105). An isolated instance of questionable zeal cannot be equated with egregious, repetitive acts of misconduct which require reversal. *United States* v. *Robbins*, 340 F.2d 684, 689 (C.A. 2); cf. *Berger* v. *United States*, 295 U.S. 78, 89.

The argument of the prosecutor, as reprinted in the petition (Pet. 15), is too abbreviated. Speaking of the informer, McCarver, petitioners quote a portion of the argument ending with the phrase "I think it is most credible" (R. 193). The argument immediately continued as follows (R. 193-194):

> "Now, the Judge tells you, just like I will also tell you, that you should receive his testimony with caution * * * If you think [the witnesses] * * * have told a falsehood on any point, you can discount that testimony. If you want to disbelieve them completely, of course you can * * *."

Moreover, defense counsel repeatedly told the jury what weight they would personally attach to the testimony of petitioner Charles Eaton (R. 176, 177, 179, 186).

This record does not reflect exceptional circumstances warranting deviation from the rule that this Court will not review arguments to the jury where defense counsel remains silent, interposes no objections, and waits until after the verdict to allege impropriety. *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150, 238-239.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CHARLES WILLIAM EATON and SAMMY LEE EATON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION.

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PETITIONERS' REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION.

Although differing in its conclusion the government's brief in opposition to the granting of certiorari does not seriously challenge the petitioners' claim that they did not receive a fair trial because of the misconduct of the prosecutor. Reliance is placed on the plain error rule; and one of the most egregious abuse of cross-examination—asking petitioner Charles Eaton about his own reputation—is characterized as "An isolated instance of questionable zeal . . ." (Gov. Br. 5).

The petitioners' other claim of prejudice—that the prosecutor abused his right to cross-examine by testifying

without opening himself to cross-examination—has not even been answered by the government. Clearly, the prosecutor had an absolute duty to put in as rebuttal evidence testimony to support the damaging inferences and prejudicial innuendos with which he loaded his questions. Six areas important to the defendants' case were touched upon in this improper manner (Pet. 20). Yet the government says nothing of this in its brief.

The government would leave this court with the impression that the evidence against the petitioners was overwhelming. Not so. The witness Pettygo is characterized as "... reluctant to aid the prosecution ..." (Gov. Br. 4). But Pettygo was *not* a reluctant government witness. He was a witness for the petitioners who directly contradicted the testimony of the government's chief witness, M. C. McCarver. In addition, five disinterested witnesses testified to McCarver's poor reputation for truth and veracity. And the defendant Charles Eaton took the stand and denied crucial portions of McCarver's story. How, then, can the government suggest that the obviously and admittedly improper tactics of the prosecutor do not call for invocation of the plain error rule?

Wherefore, petitioners pray that their Petition be granted.

Respectfully submitted,

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